STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hoekstra, P.J. and Whitbeck. and Meter, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 120489

-vs-

MELISSA ANN NUTT,

Defendant-Appellant.

Court of Appeals No. 225887
Oakland County CC No. 99-167397-FH

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

This Court entered an Order (1b) on November 20, 2002, granting Defendant-Appellant's application for leave to appeal from an Unpublished Per Curiam Opinion of November 9, 2001, of the Court of Appeals. (Hoekstra, P.J., Whitbeck, and Meter, JJ.). 10a-24a

The defendant was charged with Receiving and Concealing Stolen Firearms contrary to MCL 750.535b. Circuit Court Judge Breck dismissed defendant's charge holding that the Oakland County prosecution for Receiving and Concealing Stolen Property was barred on double jeopardy grounds by defendant's prior conviction in Lapeer County of Home Invasion in the Second Degree. The circuit court held that both charges arose out of the same transaction and that that the prosecution had been required to join the charges in one prosecution. 8a-9a, 2b-6b

The Court of Appeals, on the other hand, found in a 2-1 decision, that the Lapeer County and Oakland County crimes did not arise out of the same transaction and reversed the lower court. 10a-14a Defendant appealed to this Court and this Court granted defendant's application:

> On order of the Court, the application for leave to appeal from the November 9, 2001 decision of the Court of Appeals is considered, and it is GRANTED, limited to the issue whether the defendant's constitutional right not to be twice put in jeopardy was violated by the filing of the charges in Oakland County. The parties shall include among the issues to be briefed whether People v White, 390 Mich 245 (1973), sets forth the proper test to determine when a prosecution for the "same offense" is barred on double jeopardy grounds under Mich Const 1963, Art I, § 15, and whether our constitution provides greater protection than does US Const

Amend V. See United States v Dixon, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556, 568 (1993).

1b

COUNTERSTATEMENT OF QUESTION PRESENTED

I. THE PLAIN LANGUAGE IN CONST 1963, ART 1, § 15, AND THE INTENT OF THE RATIFIERS DEMONSTRATED A DESIRE TO ADOPT THE FEDERAL DOUBLE JEOPARDY TEST SET FORTH IN BLOCKBURGER v UNITED STATES, 284 US 299; 52 S Ct 180; 76 LEd 2d 306 (1932). THIS COURT DEVIATED FROM BLOCKBURGER IN PEOPLE v WHITE, 390 MICH 245; 212 NW2d 222 (1973). SHOULD THIS COURT RETURN TO A CONSTRUCTION OF DOUBLE JEOPARDY AS INTENDED BY THE PEOPLE OF MICHIGAN AND REINSTATE DEFENDANT'S CHARGE WHICH DID NOT VIOLATE BLOCKBURGER?

The People submit the answer is, "Yes."

The Defendant contends the answer is, "No."

COUNTERSTATEMENT OF FACTS

Defendant Melissa Nutt was charged in this case with Receiving and Concealing Stolen Firearms contrary to MCL 750.535b.

At preliminary examination, Darrold Smith testified that on December 10, 1998 his home in Lapeer County was broken into and four shotguns were stolen. 10b-12b

Lapeer police received information regarding the stolen weapons being sold (15b, 16b, 19b) and executed a search warrant on December 14, 1998 at a cabin in Oakland County. The defendant and a person by the name of John Crosley had been staying there. 15b, 16b, 18b Three of the weapons stolen from Mr. Smith's house in Lapeer County were found underneath a mattress. 17b The police also found other stolen property from other Breaking and Enterings which had occurred in Lapeer County. 23b, 24b, 25b

The defendant admitted that she drove her co-defendants around Lapeer while they broke and entered homes. 32b She stated that at the home later identified as belonging to Darrold Smith, she dropped the co-defendants off and they later emerged from the home with four guns. 33b The guns were later identified by Darrold Smith. 12b, 34b She knew that three of the weapons were being kept underneath the mattress of the cabin where she had been staying in Oakland County. 33b-34b

In January of 1999, the Lapeer County Prosecutor brought warrants against the defendant for three counts of Larceny in a Building and Three Counts of Home Invasion, Second Degree for the burglaries which occurred in Lapeer County. 21b, 43b On February 16, 1999, the Oakland County Prosecutor brought a warrant against defendant

for two counts of Receiving and Concealing Stolen Property. 52b (One count was later dismissed at preliminary examination due to the unavailability of the victim. 41b)

The Lapeer County Prosecutor offered defendant a plea agreement and the defendant pled guilty to one count of Home Invasion, Second Degree contrary to MCL 750.110a and was sentenced on April 6, 1999. She received a probationary term. 44b Preliminary Examination was commenced on the Oakland County charge on May 17, 1999 and concluded on July 19, 1999. The defendant was bound-over on one count of Receiving and Concealing Stolen Firearms.

On October 14, 1999, defendant moved to dismiss defendant's Oakland County prosecution claiming that it violated both the United States and Michigan protections against double jeopardy. Defendant claimed, citing People v White, 390 Mich 245; 212 NW2d 222 (1973), that the prosecution had been required to join the Home Invasion and Receiving and Concealing charges. 43b-51b Circuit Judge David Breck granted defendant's motion in an order dated March 1, 2000 relying on the Court of Appeals' opinion of People v Hunt, 214 Mich App 313; 542 NW2d 609 (1993) lv den 456 Mich 889; 570 NW2d 785 (1997). 8a-9a

The People appealed the circuit court's dismissal and the Court of Appeals reversed the lower court on November 9, 2001 finding that defendant's two crimes did not occur in the same transaction. 10a-14a

On November 20, 2002 this Court granted leave limited to the issue of "whether the defendant's constitutional right not to be twice put in jeopardy was violated by the filing of the charges in Oakland County." This Court indicated that the parties should

include whether People v White, supra, set forth the proper test to govern Michigan double jeopardy law concerning successive prosecutions and whether the Michigan Constitution affords defendants greater protection than does the Fifth Amendment of the United States Constitution. 1b

Additional pertinent facts will be discussed in the body of the argument section of this brief, Infra to the extent necessary to fully advise this Honorable Court as to the issues raised by the defendant.

ARGUMENT

I. THE PLAIN LANGUAGE IN CONST 1963, ART 1, § 15, AND THE INTENT OF THE RATIFIERS DEMONSTRATED A DESIRE TO ADOPT THE FEDERAL DOUBLE JEOPARDY TEST SET FORTH IN BLOCKBURGER v UNITED STATES, 284 US 299; 52 S Ct 180; 76 LEd 2d 306 (1932). THIS COURT DEVIATED FROM BLOCKBURGER IN PEOPLE v WHITE, 390 MICH 245; 212 NW2d 222 (1973). THIS COURT SHOULD RETURN TO A CONSTRUCTION OF DOUBLE JEOPARDY AS INTENDED BY THE PEOPLE OF MICHIGAN AND SHOULD REINSTATE DEFENDANT'S CHARGE WHICH DID NOT VIOLATE BLOCKBURGER.

Standard of Review:

A double jeopardy issue constitutes a question of law which is reviewed de novo on appeal. People v Lugo, 214 Mich App 699, 705; 542 NW2d 921 (1995)

Issue Preservation:

This issue was preserved by defendant in the trial court when she moved for dismissal claiming that her prosecution in Oakland County violated the double jeopardy provision of the Michigan Constitution. 2b-6b, 43b-51b

Discussion:

A. Summary of Argument

In Lapeer County, the defendant was charged with one count of Home Invasion in the Second Degree after she had broken into a residence with the intent to steal. The defendant pled guilty. 12b

The defendant was also charged with one count of Receiving and Concealing Stolen Firearms. This charge arose as a result of the defendant's possession of three

stolen firearms from the Lapeer County burglary in her residence in Oakland County four days after the Lapeer County Home Invasion. Id.

After the defendant moved to dismiss the Oakland County charge on the basis of an alleged double jeopardy violation, the circuit court dismissed the Oakland County case holding that the prosecution had been required to join the two charges from the two counties into one prosecution. 8a-9a, 2b-6b The Court of Appeals disagreed and reinstated defendant's Oakland County charge. This Court granted defendant's application for leave to appeal, limited to the question of whether double jeopardy precluded the Oakland County prosecution. The Court also requested that the parties brief the continued viability of the Michigan double jeopardy test for successive prosecutions which had previously been articulated in People v White, 390 Mich 245; 212 NW2d 222 (1973) 1b

White, supra, deviated from the plain language of Mich Const. 1963, article I, Section 15 as well as the intent of the ratifiers of the 1963 Constitution when it adopted the "same-transaction" test to govern claims of successive prosecution. Because the White Court's expansion of the definition of the word "offense" used in the double jeopardy clause of the Michigan Constitution to "transaction" was unwarranted, this Court should return to the more limited definition of "offense" which has been articulated by the United States Supreme Court.

Even if this Court moves beyond an evaluation of the text and intent of the ratifiers, there is no compelling reason for a different construction of the Michigan

Constitution's double jeopardy clause than that of the Fifth Amendment of the United States Constitution.

If this Court declines to overrule White, however, the defendant has failed to demonstrate that the Court of Appeals clearly erred in its conclusion that the Oakland County crime was not part of the same transaction as the Lapeer County offense. MCR 7.302(B)(5)

B. Both the plain language of the constitution as well as the intent of the ratifiers support the more limited definition of the term "offense" as has been given by the federal courts.

1. The Plain Language of Article I, Section 15

When interpreting the constitution of this state, one first examines the words of the constitutional provision.

> Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern . . .
>
> These rules are especially applicable to constitutions; for the people, in passing upon them, do not examine their clauses with a view to discover a secret or a double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed.

Nummer v Treasury Department, 448 Mich 534, 555 n 30; 533 NW2d 250 (1995) citing People ex rel Twitchell v Blodgett, 13 Mich 127, 167-168 (1865), (Cooley, J.) In short, "it is not the prerogative of this Court to change the plain meaning of words in the constitution 'as understood by the people who adopted it.'" Regents of the University of

Michigan, v Michigan, 395 Mich 52, 74-75; 235 NW2d 1 (1975) citing Bond v Ann Arbor School District, 383 Mich 693, 699; 178 NW2d 484 (1970)

Mich Const 1963, art I, § 15 states that "no person shall be subject for the ***same offense*** to be twice put in jeopardy." (emphasis supplied) Though the Supreme Court in White defined "offense" as "transaction", the White Court gave no etymological basis for this definition of the term "offense". In fact, the Court acknowledged that "a single factual situation may give rise to a number of substantive offenses." Id. at 256 citing Commonwealth v Campana, 452 Pa 233, 243; 304 A2d 432 (1973) with approval, 258, n 7, 260, n 10 As stated by Justice Brennan:

> It is conceded by the majority that a single transaction may encompass more than one offense, and it is equally clear that the Court intends to limit the people to a single prosecution, even where separate and distinct offenses have been committed.

White, supra at 263, (Brennan, J., dissenting)

The White Court's construction of "offense" is contrary to the plain meaning of the term. "Words do have a limited range of meaning and no interpretation that goes beyond that range is permissible." Scalia, A Matter of Interpretation: Federal Courts and the Law, (New Jersey: Princeton University Press (1997)) pp 24 "Obviously, the word *transaction* is broader than the word *offense*." (emphasis in original) White, supra, (Brennan, J., dissenting) "[A]n offence, in its legal signification, means the transgression of a law." Heath v Alabama, 474 US 82, 88; 106 S Ct 433; 88 LEd 2d 387 (1985) citing Moore v Illinois, 55 US (14 How) 13, 19; 14 L Ed 306 (1852)

> [The double jeopardy clause] protects individuals from being twice put in jeopardy "for the same *offence*" not for the same *conduct* or *actions*.

> "Offence" was commonly understood in 1791 to mean "transgression," that is, "the Violation or Breaking of a Law." . . . if each [criminal provision] contains an element the other does not, i.e., if it is possible to violate each one without violating the other, then they cannot constitute the *"same* offence." (emphasis in original)

Grady v Corbin, 495 US 508, 529; 110 SCt 2084; 109 LEd 2d 548 (1990), (Scalia, J., dissenting)[1]

The common understanding of the term "offense" at the time of the adoption of the 1963 Constitution--when the double jeopardy clause as it appears today in Michigan was adopted--clearly does not support the expansive interpretation of "offense" espoused by the White court. For example, the Michigan Legislature did not use the term "offense" consistently with the White Court's definition when the Legislature passed laws governing successive prosecutions. The statutes governing double jeopardy clearly envisioned a definition of "offense" more akin to that articulated in Blockburger. The version of MCL 768.33 existing prior to the adoption of the 1963 Michigan Constitution stated the following:

> When a defendant shall be acquitted or convicted upon any indictment for ***an offense consisting of different degrees*** he shall not thereafter be tried or convicted for ***a different degree of the same offense***, nor shall he be tried or convicted for any attempt to commit the offense charged in the indictment or to commit ***any degree of such offense***. (emphasis supplied)

MCL 763.5 existing at the time also stated:

> No person shall be held to answer on a ***second charge or indictment for any offense*** for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by

[1] Justice Scalia's dissent was later adopted as the majority rule in Dixon v United States, 509 US 638; 113 S Ct 2849; 125 LEd 2d 556 (1993)

> him in bar of any subsequent prosecution for the same offense. (emphasis supplied)

MCL 763.6 also stated:

> If any person who is indicted or informed against for any offense shall on his trial be acquitted upon the grounds of a variance between the indictment or information and the proof or upon any insufficiency or irregularity in the form or substance of the indictment, he may be arraigned again ***on a new indictment for the same offense*** notwithstanding such former acquittal. (emphasis supplied)

Though the parameters of an "offense" are not clearly delineated in these statutes, since no person could be tried for a "transaction" and a "transaction" does not have different degrees, the White Court's definition was not supported by the use of the term by the Legislature prior to the adoption of the 1963 Constitution.

Also the definition of "felony" in existence prior to the Constitutional Convention is instructive:

> Felony-The term "felony" when used in this act [the Michigan Penal Code], shall be construed to mean ***an offense*** for which the offender, on conviction may be punished by death, or by imprisonment in state prison. (emphasis supplied)

The Legislature then went on to delineate the crimes [or violations of the law] punishable by Michigan statutes, which did not encompass multiple law violations in the same transaction.

The analysis of White is flawed. "[I]t is embarrassing to assert that the single term 'same offence'. . . has two different meanings-that what *is* the same offense is yet *not* the same offense." United States v Dixon, 509 US 688, 704; 113 SCt 2849; 125 LEd 2d 556 (1993)

> [S]uppose A is charged in a single prosecution with the murders of B and C. Is it intended that the jury must choose which murder to convict upon?
>
> Certainly, if the murders of B and C are the "same offense" within the meaning of the double jeopardy clause, by reason of having been committed in the same transaction, then it is patently unconstitutional to permit the jury to return a verdict of guilty on both charges.
>
> By definition, the defendant would stand twice convicted for the same offense.
>
> Similarly, if the jury acquits A of the murder of B, but convicts him of the murder of C, how is the verdict to be received if the murders of B and C are regarded as a single offense?

White, supra at 264-265, (Brennan, J., dissenting)

Later this Court, when defining "offense" in the multiple punishment arena, did not follow the White Court's definition of "offense" but instead defined "offense" more consistently with a violation or breaking of a law. People v Robideau, 419 Mich 458; 355 NW2d 592 (1984) This Court in the dual sovereignty arena also defined "offense" as "act" rather than "transaction".[2] People v Cooper, 398 Mich 450, 463; 247 NW2d 866 (1976), (Coleman, J., concurring)

The plain language of the constitutional provision does not support the White Court's interpretation of "offense" as transaction.

> Changing by judicial construction the settled meaning of words aptly used in the Constitution is more than the exercise of legislative power. It wrests private rights from their moorings, lets down constitutional barriers, and alters the foundation of government.

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[2] Though the vitality of People v Cooper, supra has been questioned (See: People v Mezy, 453 Mich 269; 551 NW2d 389 (1996) where three justices voted to overrule Cooper), Cooper still controls Michigan dual sovereignty claims. See: People v Childers, 459 Mich 216; 587 NW2d 17 (1998) where this Court declined to reconsider Cooper's continued validity due to the Court's finding that the prosecution was proper under Cooper.

People v Pickens, 446 Mich 298, 322-323, n 26; 521 NW2d 797 (1994) citing James S. Holden Co. v Connor, 257 Mich 580, 600; 421 NW 915 (1932), (Potter J.)

2. Original Intent of the Ratifiers

The Preamble to the 1963 Constitution establishes the constitution for the "people of the State of Michigan" and article I, Section 1 provides that "All political power is inherent in the people." Consequently, Michigan law has long held that "'it is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it.' This is so because when interpreting the law '*it is the intent of the lawgiver that is to be enforced.*'"[3] (emphasis in original) Pickens, supra at 309 citing 1 Cooley, Constitutional Limitations (8th ed.), p 125 To determine the intent of the People and to clarify the meaning of the provisions adopted, the Court may consider the Constitutional Convention debates, the Address to the People, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished. Id., People v Nash, 418 Mich 196,

[3] As this Court, citing Justice Christiancy, explained:

> The question is not whether the constitution ought to have permitted the exercise of power; but whether, by a fair construction of the language of the instruction, as framed by the convention, and understood and adopted by the people, the power in question has been prohibited. Our province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the people have deemed it just and expedient to adopt.

Pickens, supra at 322, n 25 citing Blodgett, supra at 149-150

209; 341 NW2d 439 (1983) [4]

It is clear that the ratifiers of the 1963 Constitution meant to adopt the meaning given to the double jeopardy clause which had up until that point been expressed by the federal courts. The discussion at the convention centered around the then-existing difference between the double jeopardy provisions of the United States and Michigan Constitutions. The Constitution of 1908 had provided more limited protection than the Fifth Amendment of the United States Constitution. Article II, Section 14 of the 1908 Constitution had stated, "No person after acquittal upon the merits, shall be tried for the same offense." The delegates questioned this limitation and advocated returning to the same degree of protection as accorded by the United States Constitution. 1 Official Record, Constitutional Convention 1961, p 468, 539-545; See also People v Harding, 443 Mich 693, 725-726, n 12-15; 506 NW2d 482 (1993), (Riley, J., concurring in part and dissenting in part); Brief of the Amicus 16-20

However, there was no discussion regarding the prosecution of a number of different crimes arising out of the same transaction. There was also no conversation regarding giving the judiciary a broad-ranging power to define the concept of double

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[4] As this Court warned:

> Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express.

Sitz v Department of State Police, 443 Mich 744, 764; 506 NW2d 209 (1993) citing People v Harding, 443 Mich 693, 722; 506 NW2d 482 (1993)

jeopardy. Instead a delegate stated that the Supreme Court of Michigan virtually had held the prior provision to mean "the same thing as the provision in the federal constitution, which is what we have put it. . ." 1 Official Record, Constitutional Convention 1961, p 561; See also: People v Mezy, 453 Mich 263, 279-280; 551 NW2d (1996)(Riley, J.)

> The Address to the People prior to the ratification of the 1963 Constitution stated:
>
> [t]he new language . . .involves ***the substitution of the double jeopardy provision from the United States Constitution in place of the present provision*** which merely prohibits 'acquittal on the merits.' This is more consistent with the actual practice of the courts in Michigan. (emphasis supplied)

2 Official Record, Constitutional Convention 1961, p 3364 If the framers or ratifiers had intended to alter the meaning of this provision beyond the interpretation by the United States Supreme Court, "we can presume 'they would have done so by *express* words. . .'" (emphasis in original) Pickens, supra at 318 citing People ex rel Kennedy v Gies, 25 Mich 83, 88 (1872)[5]

[5] In Pickens, supra at 317, this Court declined to construe the Michigan Constitution as offering broader Sixth Amendment protections to defendants when there was no support in the history of the Constitutional Convention for a different interpretation than that accorded by the United States Constitution. This Court stated:

> Thus, we may examine the circumstances surrounding the adoption of the provision to aid in elucidating the intent underlying the provision. The circumstances surrounding this particular provision provide no evidence to support a finding that at the time of its ratification it was conceived that the constitution would be construed to adopt protections stronger than Strickland. The historical understanding of the provision before the 1963 Constitution did not include such a standard. Neither the Address to the People nor the Constitutional Convention debates suggest that a heightened standard was understood to be incorporated by the constitution. No evidence has been revealed offering insight into why ratifiers or framers may have envisioned such a standard to have been included in the constitution.

The double jeopardy test which was uniformly followed by the United States Supreme Court both in the areas of multiple punishment and successive prosecution was that which was adopted in Blockburger v United States, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932)[6] The Blockburger test inquires whether each offense contains an element not contained in the other. If not, they are the "same offense" and double jeopardy bars additional punishment and prosecution. Dixon, supra, 508 US at 696

Furthermore, before the adoption of the 1963 Constitution and before this Court's decision in White, this Court specifically declined to prohibit successive prosecutions arising out of the same transaction. In People v Townsend, 214 Mich 267; 183 NW 177 (1921) the defendant was convicted of driving while intoxicated and was later charged with involuntary manslaughter arising out of the same transaction. This Court stated that "the transaction charged may be the same in each case, but if the offenses are different, there is no second jeopardy for the same offense." Id. at 275 citing Gravieres v United States, 220 US 338; 31 S Ct 421; 55 LEd 2d 489 (1911) This Court went on to state, "if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either does not exempt the defendant from prosecution and punishment under the other." Id. at 276 citing Morey v Commonwealth, 108 Mass 433 (1871)

In People v Grimmett, 388 Mich 590; 202 NW2d 278 (1972) when the defendant

[6] See United States v Dixon, supra (which indicated that the United States Supreme Court applied the Blockburger test until 1990 when the test changed in Grady v Corbin, supra. In Grady, the Court adopted a short-lived "same-conduct" test for successive prosecutions, a test which was abrogated three years later. The Court in United States v Dixon, supra returned to the "same-elements" test of Blockburger.)

held up a grocery store and killed the owner and shot a customer, the defendant was charged in separate prosecutions with the murder and the assault. This Court did not find defendant's claim of a double jeopardy violation persuasive, instead indicating that the regulation of successive prosecution claims was for the Legislature. Id. at 607

Therefore, when the framers mentioned "actual practice of the courts in Michigan", this "practice" did not include the application of the "same transaction" test.[7] Instead, Michigan Courts had applied the test used by the United States Supreme Court. The People submit the framers sought to incorporate the federal test into the Michigan Constitution. Because "this Court has long held that a constitution must be interpreted as understood by its ratifiers" [People v Pickens, supra at 310 citing Lockwood v Comm'r of Revenue, 257 Mich 517, 556-557; 98 NW2d 753 (1959)], the interpretation of article I, Section 15 of the Michigan Constitution should be consistent with the federal interpretation of the Fifth Amendment prior to the adoption of the 1963 Constitution.

C. There is no compelling reason to interpret the Michigan and United States' double jeopardy provisions differently.

The People submit that to accurately interpret the constitution enacted by the People, the inquiry should end after an analysis of the text and original intent of the ratifiers of the Constitution.[8] However, in the past this Court has found that defendants

[7] In People v Powers, 272 Mich 303; 261 NW 543 (1935) the Court specifically commented that though the wording of the [1850 and 1908] Michigan Constitution was more liberal than the federal double jeopardy clause, "the law of jeopardy is doubtless the same under both provisions." Id. at 307 citing In Re Ascher, 130 Mich 540, 545; 90 NW 418 (1902)

[8] If the judiciary were interpreting a statute and either the meaning of the text or intent of the legislature were clear, the analysis would end. See for example: People v McIntire, 461 Mich

(continued . . .)

could be accorded more rights under the Michigan Constitution even when the language of the state and federal constitutions are identical, but only "where there is a compelling reason." People v Smith, 420 Mich 1, 20; 360 NW2d 841 (1984); People v Collins, 438 Mich 8, 25; 475 NW2d 684 (1991); People v Bullock, 440 Mich 15, 30; 360 NW2d 841 (1992); Sitz v Dep't of State Police, 443 Mich 744, 752; 506 NW2d 209 (1993)

Sometimes this Court has given great weight to whether the language of the text itself and the intent of the framers demonstrate a "compelling reason" for different treatment under the two Constitutions. See Collins, supra, at 32-33; People v Hill, 429 Mich 382, 392-393; 415 NW2d 193 (1987) This Court has also noted six factors which could be used to determine whether to interpret the Michigan Constitution more stringently. Collins, supra at 31, 39; Sitz, supra at 763 n 14 On other occasions, this Court has looked to policy reasons to determine whether there was a "compelling reason" for different treatment. Smith, supra at 20

147, 158; 599 NW2d 102 (1999)(indicating that "the object of judicial statutory construction is not to determine whether there are valid alternative policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature actually made.")

However, the construction of a constitutional provision should be no different especially when the People themselves ratified the constitution. As stated by Justice Scalia:

> If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable.
>
> * * *
>
> Neither the text of such a document nor the intent of the framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.

Scalia, A Matter of Interpretation: Federal Courts and the Law, pp 40

The language of the text and the intent of the ratifiers do not demonstrate a compelling reason for disparate treatment. Furthermore, an evaluation of the six factors mentioned by this Court in Collins and Sitz also do not reveal a compelling reason to accord defendant more protection under the Michigan Constitution.

a. Six-part test

This Court in People v Sitz, supra at 763 n 14 listed several factors which could be helpful in determining whether the Michigan Constitution and federal constitution afford different levels of protection. These factors are:

> 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.

1) the textual language of the state constitution,

As previously stated, the words of the Michigan double jeopardy provisions do not support defining an "offense" as a "transaction".

2) significant textual differences between parallel provisions of the two constitutions,

The wording of the federal and state double jeopardy provision is virtually identical. The double jeopardy provision in the Fifth Amendment of the United States Constitution states in pertinent part that, **"[n]o person shall . . . be for the same offense to be twice put in jeopardy of life or limb . . ."** The double jeopardy provision of the Michigan Constitution provides that "**[n]o person shall be subject for the same offense to be twice put in jeopardy."** Const. 1963 art 1, § 15 During the constitutional debates,

it was mentioned that the "life and limb" language of the United States Constitution was archaic and that these phrases did not add anything to the interpretation.[9]

3) state constitutional and common law history,

The state constitutional and common law history, as stated supra, indicates that both the framers and ratifiers intended the same degree of double jeopardy protection as was accorded to the United States Constitution. White did not derive the "same-transaction" test from Michigan constitutional history but instead from the concurrence written by Justice Brennan in a decision concerning collateral estoppel, Ashe v Swenson, 397 US 436, 448; 90 S Ct 1189, 1197; 25 L Ed 2d 468, 478 (1970), which has never been adopted by the United States Supreme Court to govern successive prosecution double jeopardy law.

Further, as also stated previously, Michigan Courts had rejected the same transaction test until its adoption in White. See Grimmett, supra; Townsend, supra White did not cite Michigan common-law authority in its adoption of the "same-transaction" test but instead cited to sister jurisdictions. White, supra, at 255-256 However, other states' jurisprudence is not probative on the protection Michigan affords in its own Bill of

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[9] The comment to the prospective revision of the double jeopardy clause of the Michigan Constitution reads as follows:

> The foregoing change in section 14 involves the substitution of the double jeopardy provision from the Constitution of the United States *(except for the deletion of the obsolete words of "life or limb")* in place of the original provision which merely prohibits retrial after "acquittal upon the merits." (emphasis supplied)

1 Official Record, Constitutional Convention 1961 p 468

Rights. As this Court stated when rejecting this rationale for heightened protection under the Michigan Constitution in Pickens, supra at 320:

> Alaska, Hawaii, and Massachusetts have not been known to adjudicate Michigan constitutional claims, nor is our fundamental document modeled after theirs. Michigan has a very distinct constitutional history, given content by its own constitutional conventions and ratifications in 1835, 1850, 1908, and 1963 and the adjudications arising from them.

Further, the vast majority of states presently have adopted the Blockburger test for constitutional successive prosecution claims.[10] Those that have accorded more protection

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[10] Alabama (Ex Parte Rice, 766 S02d 143 (Ala., 1999); Ex Parte Howard, 710 SO2d 460 (Ala., 1997)), Arizona (Hernandez v Superior Court, 179 Ariz 515; 880 P2d 735 (1994)), Arkansas (Sherman v State, 326 Ark 153; 931 SW2d 417 (1996)), California (People v Scott, 15 Ca 4th 1188; 65 Cal Rptr 2d 240; 939 P2d 354 (1997) cert den 523 US 1025; 118 S Ct 1310; 140 LEd 2d 475 (1998)), Colorado (People v Allen, 868 P2d 379 (Colo., 1994) cert den 513 US 842; 115 S Ct 129; 130 L Ed 2d 73 (1994)), Florida (Gibbs v State, 698 SO2d 1206 (Fla., 1997)), Georgia (Perkinson v State, 273 Ga 491; 542 SE2d 92 (2001)), Idaho (State v Reichenberg, 128 Idaho 452; 915 P2d 114 (1996); Garcia v State Tax Commission, 136 Idaho 610; 38 P2d 1266 (2002)), Illinois (People v Eggerman, 292 Ill App 3d 644; 226 Ill Dec 493; 685 NE2d 948 (1997)), Kansas (State v Barnhart, 266 Kan 541; 972 P2d 1106 (1999)), Kentucky (Commonwealth v Burge, 947 SW2d 805 (Ky., 1996) cert den 522 US 971; 118 S Ct 422; 139 LEd 2d 323 (1997)), Maine (State v Fairfield, 644 A2d 1052 (Me., 1994); State v Poulliot, 726 A2d 210 (Me., 1999)), Minnesota (State v Bowen, 560 NW2d 709 (Minn., 1997)), Mississippi (Thomas v State, 711 SO2d 867 (Miss., 1998); Powell v State, 806 SO2d 1069 (Miss., 2001)), Missouri (Pfeiffer v State, 88 SW3d 439 (Mo., 2002); State v Blackmun, 968 SW2d 138 (Mo.,1998) cert den 525 US 1019; 119 S Ct 546; 142 LEd 2d 454 (1998)), Nebraska (State v Stubblefield, 249 Neb 436; 543 SW2d 743 (1996)), Nevada (Zebe v State, 112 Nev 1482; 929 P2d 927 (1996)), New Mexico (State v Powers, 126 NM 114; 967 P2d 454 (1998) lv quashed 127 NM 393; 981 P2d 1210 (1999)), New York (People v Bryant, 92 NY 2d 216; 677 NYS2d 286; 699 NE2d 91 (1998)), North Carolina (State v Raines, 319 NC 258; 354 SE2d 486 (1987)), North Dakota (City of Fargo v Hector, 534 NW2d 821 (N.D., 1995)), Oklahoma (Mooney v State, 990 P2d 875 (OK., 1999)), Pennsylvania (Commonwealth v Failor, 734 A2d 400 (Pa., 1999) rev'd on other grounds 564 Pa 642; 770 A2d 310 (2001)), Rhode Island (State v Innis, 311 A2d 158 (RI., 1978) modified on other grounds Rhode Island v Innis, 446 US 291; 100 S Ct 682; 64 LEd 2d 297 (1979)), South Carolina (State v Easler, 327 SC 121; 489 SE2d 617 (1997)), South Dakota (State v Weaver, 648 SW2d 355 (S.D., 2002)), Texas (Ex Parte Rhodes, 974 SW3d 735 (Tex., 1998); Ex Parte Nikki Marie Jones, 36 SW2d 139 (Tex., 2000)), Vermont (State v Forbes, 147 Vt 612; 523 A2d 1232 (1987)), Virginia (Johnson v Commonwealth, 38 Va App 137; 562 SE2d 341 (2002)), Washington, (State v Gocken, 127 Wn 2d 95; 896 P2d 1267 (1995)), West Virginia

(continued...)

for defendants for the most part have not relied on their constitutional provisions but instead on statutes enacted by the Legislature.[11] The People note that of the six states that have evaluated their state constitutional double jeopardy provisions differently than that of the United States Constitution, none have adopted the "same-transaction" test. Further, the lower courts in two of the states have also questioned the continued viability of their state double jeopardy test due to their high courts' reliance on the overturned United States Supreme Court decision of Grady v Corbin.[12]

(State ex rel State v Hill, 201 WVa 95; 491 SE2d 765 (1997)), Wisconsin (State v Vassos, 218 Wis 2d 330; 579 NW2d 35 (1998)), and Wyoming (State v King, 48 P3d 39 (WY, 2002)) use the Blockburger test for constitutional successive prosecution claims.

Though Delaware (Bailey v State, 521 A2d 1069 (Del., 1987); State v Willis, 673 A2d 1233 (Del., 1995)), Iowa (State v Taylor, 596 NW2d 55 (Iowa, 1999); State v Shafranek, 576 NW2d 115 (Iowa, 1998)), Ohio (State v Gustafson, 70 Ohio St 3d 425; 668 NE2d 435 (1996)), and Utah (People v Wood, 868 P2d 70 (Utah, 1993)) do not appear to have litigated the issue of whether these states have a separate test for state constitutional successive prosecution claims, they apply Blockburger in the area of multiple punishment.

Though in Massachusetts Grady has been strongly criticized as redefining the word "offense", the court does not appear to have had the occasion to apply Dixon to successive prosecution claims which it is likely it will do since Massachusetts has no double jeopardy provision in its state constitution. (Commonwealth v Woods, 414 Mass 343; 607 NE2d 1024 (1993) cert den 510 US 815; 114 S Ct 65; 126 LEd 2d 35 (1993))

[11] Arizona (Ariz. Rev. Stat. Ann. 13-116), Arkansas (Ark. Code Ann. 5-1-113(1)(a)), Colorado (Colo. Rev. Stat. 18-1-408(2)), Illinois (720 ILCS 5/3-3), Kansas (Kan. Stat. Ann. 21-3108(2)(a)), Maine (Me. Rev. Stat. Ann. 17-A § 14), Minnesota (Minn. Stat. 609.035), Missouri (Mo. Rev. Stat. 556.041), Montana (Mont. Code Ann. 46-11-503), New York (N.Y. Crim. Proc. Law. 40.20), Oregon (Or. Rev. Stat. § 131.515), Pennsylvania (18 Pa CSA 110), Utah (Utah Code Ann. 76-1-402), Virginia (Va. Code Ann. § 19.2-294), and West Virginia (W. Va. R. Crim. P. Rule 8(a)) have adopted a court rule or statutory provision to address claims of successive prosecution.

[12] Alaska uses a test for successive prosecution which is akin to the test employed by Michigan in People v Robideau, supra. Whitton v State, 479 P2d 302 (Alas. 1970)

Connecticut does not have a double jeopardy provision in its constitution and adopted the "same-conduct" test (such as used in Grady v Corbin, supra) based on federal law. See: State v Lonergan, 213 Conn 74; 566 A2d 677 (1989) However, this test has since been questioned with

(continued. . .)

4) state law preexisting the adoption of the relevant constitutional provisions,

The Michigan Legislature did not prohibit successive prosecutions of offenses occurring in the same transaction. See: MCL 763.5, MCL 763.6, MCL 768.33

5) structural differences between the state and federal constitutions,

There is no difference between the structure of the state and federal constitutions which would affect the interpretation of the double jeopardy clause.

6) matters of peculiar state or local interest,

No peculiar state or local interests exist in Michigan to warrant a different level of protection with regard to successive prosecutions than in the federal system. Both the federal and state provisions originated from the same concerns and to protect the same rights. (See White's citation of Justice Brennan's concurrence in Ashe v Swenson, 397 US at 450-454 which contains the same policy reasons for adoption of the "same-transaction" test as stated by the White court) Furthermore, as seen from the absence of Michigan common law authority in White, Michigan does not have a unique history with regard to its own double jeopardy provision. Cf: Pickens, supra at 318

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the passing of United States v Dixon, supra by the United States Supreme Court. See: State v Murphy, 47 Conn Supp 258; 787 A2d 67 (2001)

Hawaii has adopted the "same-conduct" test used in Grady v Corbin, supra. See: State v Lessery, 75 Haw 446; 865 P2d 150 (1993)

Louisiana and Indiana apply the "same-evidence" test for successive prosecutions. See: State v Murray, 799 SO2d 53 (La., 2001); Thomas v State, 764 NE2d 306 (Ind., 2002)

Tennessee uses a multi-faceted test to evaluate a successive prosecution claim. The court applies Blockburger, looks at whether the same evidence was used to prove both crimes, considers whether there were multiple victims or discrete acts, and reviews the purposes of the respective statutes. None of the steps is determinative but rather the results of each must be weighed and considered in relation to each other. State v Winningham, 958 SW2d 740 (Tenn., 1997)

The previously mentioned six factors do not reveal a compelling reason for a different interpretation of Michigan's double jeopardy provision from that of the Fifth Amendment of the United States Constitution.

b. social policy

This Court has in the past turned to policy reasons to evaluate whether to give defendants more protection under the Michigan Constitution. This appears to be the underpinning of the White decision when the Court stated that its decision "promote[d] the best interests of justice and sound judicial administration." White, supra at 258 The People submit that absent support from the text or the intent of the ratifiers of the constitution, the courts can not turn to social policy to create new rights.[13] "Every

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> A judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

The Nature of Judicial Process, quoted in In re President & Directors of Georgetown College, Inc., 118 US App DC 90, 97; 331 F2d 1010 (1964)(Burger, J., concurring in dissent) cert den 377 US 978 (1964)

Also as stated by Justice Scalia:

> Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of evolution.
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> * * *
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> What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the

(continued. . .)

desirable practice need not rest upon further expansion of our elastic constitution which, if it can be interpreted to encompass everything, may eventually mean nothing." Crampton v 54-A District Judge, 397 Mich 489, 520; 245 NW2d 28(1976) (Coleman, J., concurring in result) As stated by Justice Cooley,

> A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. What a court is to do, therefore, is *to declare the law as written* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass upon it. (emphasis in original)

Cooley, Constitutional Limitations (6th ed.) p 68-69 However, even if this Court would look to social policy concerns in determining whether the Michigan Constitution should give defendants more protection, the result should not change.

This Court in White stated that the "same-transaction" test was important so the prosecution would be required to "bring to trial a defendant as expeditiously and economically as possible." Id. at 258 Also, this Court found that the test would prevent "harassment" of a defendant to save him costs and to prevent prosecutorial sentence shopping. Id. at 258-259 However, the United States Supreme Court in Dixon, supra

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> philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.

Scalia, A Matter of Interpretation: Federal Courts and the Law, pp 44-45

rejected that Court's previous proposition in Grady that the Blockburger test did not sufficiently protect defendants from the burdens of multiple trials. As Dixon stated, "[b]ut in any case Justice Souter's concern that prosecutors will bring separate prosecutions in order to perfect their case seems unjustified." Dixon, supra 509 US at 710, n 15 Dixon stated that a later prosecution may be barred by the principles of collateral estoppel and that the prosecution is likely to be deterred from multiple prosecutions by the sheer press of other demands on resources. Id. As previously stated, many states have also held that the Blockburger test adequately protects defendants from successive prosecutions.

Furthermore, as stated by Dixon, the White Court's concern that the prosecution is desirous of successive prosecutions is not accurate. The prosecution in the overwhelming majority of cases wants to join all possible charges against the defendant into one proceeding, not wishing to expend the time and resources trying the defendant multiple times for crimes which occur during the same transaction. It is defendants who primarily wish to sever trials hoping to preclude the jury from finding out that they are charged with multiple criminal offenses.

When the prosecution does wish to prosecute defendants in different prosecutions for crimes which occur during the same transaction, it is primarily for two reasons. Sometimes, such in this case, the defendant commits crimes in two different counties. Different counties may have different crime problems which would result in different charging decisions by the two prosecutors. For example, burglaries may plague rural counties while more urban counties may be afflicted with weapons-related crimes. These different concerns may prompt each county to charge the defendant as soon as sufficient

evidence is mustered on each individual charge. Under the present system, which prosecution is ultimately successful depends on a race to the courthouse.

In this case for example, because the Lapeer County prosecution was resolved first, the specific criminal justice concerns of the People in Oakland County may not have been adequately addressed. In Lapeer, the defendant was allowed to enter into a plea bargain and received probation. If the Oakland County crime had been part of the same transaction, the defendant would escape liability for acts which occurred in Oakland since the Lapeer County Prosecutor did not charge the crime which occurred in Oakland. The same transaction test hinders the individual county prosecutor's ability to best protect his or her own citizens.

The second reason the prosecution may wish to proceed against defendants in more than one transaction is due to public safety concerns. Though the prosecution may not have finished gathering evidence on one of the crimes, the prosecution may wish to charge one of the counts because the defendant is a danger to the public. Requiring the prosecutor to bring all charges arising out the same transaction at the same time forces a prosecutor to proceed on charges that may not be ready for prosecution. A prosecutor may feel that he or she has to proceed despite some of the charges not being ready for prosecution because he or she fears that the defendant may leave town or commit additional crimes. Thus, a defendant may be acquitted of charges that he might not otherwise be if the prosecutor had waited until further investigation was completed. Society does not benefit in such a situation.

Defendant has expressed the concern that in a case such as this that a defendant could be charged with counts of Receiving and Concealing Stolen Property arising out of every county which a defendant passed through. However, if the defendant were convicted of the exact same offense in each county, the case would not meet the Blockburger test. Whether there should be further exceptions to the Blockburger test is not a question before this Court. Furthermore, defendant's concern seems exaggerated. Each county would have to prove venue for the prosecution in its own county which would be difficult. Also it is unlikely that each county a defendant passes through would wish to expend its resources prosecuting the exact same offense with the exact same concurrent penalty.

Defendant also claims that if the "same-transaction" test is overturned, if defendant is acquitted of one offense, the prosecution then can proceed on other crimes. However, as previously stated, the prosecution has a vested interest in charging defendant with all possible crimes during one transaction. Dixon, supra Furthermore, if the defendant is acquitted of one of the offenses, the prosecution runs the risk of being collaterally estopped from proceeding on other charges. Id.; See for reference: People v Garcia, 448 Mich 442; 531 NW2d 683 (1995)(where this Court discussed the principles of implicit acquittal on one offense being a bar to subsequent prosecution on another crime); Ashe v Swenson, supra

The concern expressed by the White Court regarding sentence shopping also seems misplaced. The legislatively expressed state policy requiring concurrent rather than consecutive sentencing in the absence of specific legislature authorization avoids the

harshness that might otherwise result from successive prosecutions. Cf: People v Wakeford, 418 Mich 95, 113; 341 NW2d 68 (1983) Furthermore, the sentencing powers of the courts have been limited by the statutory sentencing guidelines and the possibilities for "sentence shopping" have been tightly curtailed since the White decision. Also any concern that the prosecution's delayed charging denied the defendant the possibility of concurrent sentences could be addressed in the sentence imposed. See: People v Adkins, 433 Mich 732, 751, n 10; 449 NW2d 400 (1989)

Additionally, the White Court's concern about the continued state of anxiety of the defendant is addressed by our statutes of limitations as well as the due process clause. See: People v Sierb, 456 Mich 519, 531; 581 NW2d 219 (1998)(indicating that the due process clause and statutes of limitation prevent prejudice to the defendant caused by passage of time.) See also: People v Loyer, 169 Mich App 105; 425 NW2d 714 (1988) lv den 432 Mich 900; 438 NW2d 248 (1989)(which employs a balancing test for pre-arrest delay)

As seen by this case as well as the cases of People v Hunt, 214 Mich App 313; 542 NW2d 609 (1995) lv den 456 Mich 889; 570 NW2d 785 (1997) and People v Flowers, 186 Mich App 652; 465 NW2d 43 (1990) the "same-transaction" test is difficult to apply because many times it depends on a court's subjective view of when the passage of time between the incidents becomes remote enough that the crimes were not part of the same transaction. That test does not provide uniformity in its application as can be seen from the fractured opinion of the lower court.

This Court has made it clear that the exercise of the sovereign power of government is left to the executive and the legislative branches. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 682-684; 194 NW2d 693 (1972) Therefore even if this Court believed that the Blockburger test did not adequately protect defendants, the concerns expressed by White could clearly be addressed by adoption of a court rule or statute regarding compulsory joinder as other states have done.[14] The legislature could amend MCL 763.5, MCL 763.6 or MCL 768.33, or this Court could alter MCR 6.120 to include provisions for compulsory joinder.[15] Const. 1963 art VI, § 5

Before the White test was adopted, however, the Michigan Legislature had not expressed the desire to regulate multiple prosecutions arising out of the same transaction. Evidently there had not been a documented problem with successive prosecutions in these circumstances. The Legislature only precluded successive prosecutions for a greater or lesser included offense or an attempt of the crime he was convicted of previously (MCL 768.33), as well as for a crime of which he was previously acquitted (MCL 763.5) except in a limited circumstance. MCL 763.6

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[14] See: White, supra at 245 (Brennan, J., dissenting)(indicating that the perceived danger listed by the majority could be overcome by adopting a court rule requiring joinder of charges); Grimmett, supra at 607 (holding that the adoption of the "same-transaction" test was properly a decision for the Legislature); Collins, supra at 34-35 (where this Court rejected further protections in the area of participant monitoring than accorded by the United States Constitution but stated:

> Finally, we emphasize that nothing in our decision today will preclude the Legislature from adopting such controls and restraints, including restrictions on the use of evidence, as might be considered necessary to guard against arbitrary or capricious use within the state system of this investigative technique.)

The supposed undocumented evils of successive prosecutions do not merit the expansion of protection under the Michigan Constitution especially when, if these problems do emerge, they can be adequately addressed by a court rule or statute. However, failing to change the test articulated in People v White, supra absolutely precludes the People from expressing their opinion on successive prosecution since the rule has received constitutional imprimatur.[16]

D. The principles of stare decisis do not mandate a different result.

Stare decisis is not an inexorable command and should not be invoked to prevent the Court from overruling wrongly-decided cases except when more mischief would result from overruling them. People v Graves, 458 Mich 476, 481; 581 NW2d 229 (1998); People v Cornell, 466 Mich 335, 358 n 14; 646 NW2d 127 (2002) The standards which are applied in deciding whether to overrule a case also do not rest upon the length of time that the rule has been in effect. Graves, supra at 480 The interests in the "even-handed, predictable, consistent development of legal principles" and the "integrity of the judicial process" mandate correction of an erroneously decided decision of constitutional magnitude. See for reference: People v Cornell, supra As stated by the United States Supreme Court when overruling Grady,

> [A]lthough stare decisis is the "preferred course" in constitutional adjudication "'when governing decisions are unworkable or are badly reasoned' this Court has never felt constrained to follow precedent." We would mock stare decisis and only add chaos to our double jeopardy

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[15] However, if the People disagreed with the court rule they could pass legislation to express their intent.

[16] "Judges are *not*, however, naturally appropriate expositors of the aspirations of the plebiscite." (emphasis in original) Scalia, A Matter of Interpretation: Federal Courts and the Law, pp 136

jurisprudence by pretending that Grady survives when it does not. (citations omitted)

Dixon, supra, 508 US at 712

White did not accurately express the will of the People at the time of the 1963 Constitution. Unlike other areas of law, because this judge-made law has constitutional imprimatur, the People of the State of Michigan are presently absolutely precluded from changing it. Application of stare decisis in this case would frustrate the ability of the People to make their own policy decisions about the joinder of prosecutions.[17] The People submit that for these reasons as well as those stated by the amicus, stare decisis should not prevent this Court from overruling White. Brief of the Amicus, p 3-4, 13-14

E. The prosecution in Oakland County did not violate Blockburger v United States, supra.

Applying the federal Blockburger test--which the People submit is the proper test to govern both federal and state successive prosecution claims--it is clear that the second prosecution of the defendant would not violate double jeopardy. Each of the offenses requires proof of a different element.

In Lapeer, the defendant pled guilty to Home Invasion in the Second Degree (apparently on the theory of aiding and abetting). The elements of this offense in this case are the following:

(1) that the defendant broke into a building,

[17] "For as judicial lawmaking expands, the democratic elements in our republican experiment atrophy. American men and women not only are deprived of having a say on how we order our lives together, but we lose the skills of self-government." Scalia, A Matter of Interpretation: Federal Courts and the Law, "Comment" by Mary Ann Glendon, pp 109

(2) that the defendant entered the building,

(3) that when the defendant entered, she intended to commit a larceny.

MCL 750.110a[18]

In Oakland, the defendant was charged with Receiving and Concealing Stolen Firearms. The elements of this offense are the following:

(1) that the defendant concealed a stolen firearm,

(2) that the defendant knew that the firearm was stolen at the time she concealed it.

MCL 750.535b

Because none of the elements of the two crimes overlap, the prosecution in Oakland County would not violate Blockburger, which was the test for double jeopardy violations when the 1963 Michigan Constitution was adopted as well as the one presently applied by the federal courts.[19] See Dixon, supra.

F. The offense in Oakland County was not part of the same transaction as the Lapeer County crime.

Even if the "same-transaction" test would be applied, the defendant has failed to show that the Court of Appeals clearly erred in the application of the White test to the facts of this case. MCR 7.302(B)(5) Under the "same-transaction" test, the prosecutor is required to join at one trial all charges that grow out of a continuous time sequence and which demonstrate a single intent and goal when the crimes at issue involve specific

[18] MCL 750.110a was subsequently amended by P.A. 1999, No. 144, Eff. Oct. 1, 1999.

[19] Defendant claims that the Oakland County prosecution following defendant's plea in Lapeer violates the federal double jeopardy test; however, defendant cites the test proposed in Grady which has since been abrogated by Dixon.

intent as an element. Crampton v 54-A District Judge, supra at 501-502 Where, as is true in the present case, one of the crimes does not involve specific intent as an element, the test focuses on whether the offenses were part of the same criminal episode and whether the offenses involve laws intended to prevent the same or similar harm or evil, rather than substantially different harms or evils. Id. at 502 Under this general intent test, there was no double jeopardy violation in light of the facts of the present case.

The crime of 2nd Degree Home Invasion, the crime for which defendant was convicted in Lapeer County, is a specific intent crime. People v Ferguson, 208 Mich App 508, 509; 528 NW2d 825 (1995). However, the crime of Receiving and Concealing Stolen Property is not a specific intent crime. People v Flowers, supra at 654 Thus it must be shown by defendant that the offenses involved in this case were part of the same criminal episode and that they involve laws intended to prevent the same or similar harm or evil, rather than substantially different harms or evils.

First, the two crimes in this case were not part of the same "criminal episode." The burglary in Lapeer County was committed on December 10th while the possessory crime in Oakland County was not committed until four days later, on December 14th. This lapse of time is significant because in Hunt, supra, the case relied on by the trial court, there was no break in the sequence of events. There the defendant broke into a home and stole property (a watch) which he then pawned on the same day. "The breaking and entering and the possession of the stolen goods were clearly part of a single criminal episode in which defendant intended to convert the victim's property into his own." Id. at 317 The Hunt Court specifically distinguished Flowers, supra, a case factually identical to the

present one, on the basis of time."[A]rmed robbery and possession of stolen property on different days are not part of the same transaction." Hunt, supra at 317 (emphasis in original)[20]

In Flowers, supra, the defendant committed an Armed Robbery in Oakland County and took the victim's car. The following day, the defendant was apprehended and charged in Wayne County with Possession of Stolen Property. The stolen property was the vehicle taken in the Oakland County robbery. Id. at 653. Defendant was convicted in Wayne County for Receiving and Concealing Stolen Property. He then claimed that his subsequent conviction in Oakland County for the robbery was prohibited on double jeopardy "same-transaction" grounds. The Flowers Court found the same transaction test applicable since one crime was a specific intent crime (Armed Robbery) and the other (Receiving and Concealing Stolen Property) was a general intent crime. However, the Court concluded that the two crimes were not part of the same transaction since they were committed on separate days. Id. at 654 The facts of the present case are nearly identical to Flowers and perhaps even stronger since there was a four-day break between the crimes instead of just one. As stated by Judge Meter in the Court of Appeals in this case:

> Flowers essentially demonstrates that for both a concealing conviction and a related, separately-prosecuted home invasion conviction to be deemed as having arisen from separate criminal episodes, there is no requirement that

[20] Furthermore, the Court of Appeals has strongly criticized the Court's reasoning in Hunt in People v Squires, supra at 458. Squires indicated that Hunt's conclusion that the defendant could not be convicted of both Breaking and Entering and Receiving and Concealing was mere dicta. In Squires, when the Court was considering the question of multiple punishment, the Court held that the defendant could be convicted of both offenses.

> a defendant "wait[] some period" before concealing the stolen property or that the concealment be "completely unrelated to the theft." Indeed, in Flowers, the robbery and the possession of the stolen property occurred within minutes of each other, yet the Court deemed the crimes sufficiently separate because the possession continued into the day following the robbery. Id. at 653 Similarly, in the instant case, defendant invaded several homes, and, regardless of what happened in the meantime, she concealed stolen firearms four days later.

11a The present crimes did not involve crimes from the "same criminal episode."

Also, the harm or evil to be prevented by the Home Invasion statute (the Lapeer County crime) and the harm or evil to be prevented by the statute that prohibits Possession of a Stolen Firearm (the Oakland crime) are substantially different and they address different social norms. The statute prohibiting Home Invasion has as its purpose the right to peaceful habitation. People v Squires, 240 Mich App 454, 459; 613 NW2d 361 (2000); People v Spivey, 202 Mich App 719, 725; 509 NW2d 908 (1993) lv den 446 Mich 857; 521 NW2d 118 (1994); People v Winhoven, 65 Mich App 522, 526; 237 NW2d 540 (1975) In contrast, the statute prohibiting the Possession of Stolen Firearms has an entirely different purpose, namely prohibiting the illegal acquisition and possession of stolen firearms because of their likely use in future criminal activity and because of their potential for illegal unregulated distribution to others. Since the purposes behind the two statutes are dissimilar, double jeopardy would not bar prosecution of defendant for possession of stolen firearms. People v Phebus, 166 Mich App 632, 635; 421 NW2d 175 (1987) See also Squires, supra (holding that the Breaking and Entering and Receiving and Concealing Stolen Property statutes were aimed at

protecting distinct social norms)[21] Moreover, the two statutes are located in different chapters of the Penal Code, "meaning that they are not hierarchical or cumulative" as well are not particularly similar in their elements. People v Peerenboom, 224 Mich App 195, 201; 568 NW2d 153 (1997) lv den 458 Mich 862; 587 NW2d 638 (1998); People v Squires, supra at 458-459

The state has a high interest in the regulation of firearms and stolen firearms are perhaps of even greater concern because of the likelihood they will fall into the hands of those who would not otherwise be entitled to possess them. In this case there was information that the stolen guns were being sold. 15b, 16b, 19b The unregulated distribution of firearms within the state, and certainly the sale or distribution of stolen firearms to others who would use them for criminal purposes, is of paramount concern to the citizens of this state because of the great potential for harm which firearms can cause. That is the clear reason why the legislature singled out stolen firearms from the general statute prohibiting the possession of stolen property when they enacted 1990 PA 321 (MCL 750.535b, the crime defendant was charged with). In 1990, the legislature enacted a series of measures, including the crime charged in the present case, specifically

[21] Again, attention is drawn to the language in Hunt which is used to distinguish it from Flowers, supra on this very point:

> Moreover, the offenses are closely related and in the same class or category, see People v Adams, 202 Mich App 385, 387; 509 NW2d 530 (1993), and thus unlike the crimes at issue in Flowers, the laws may be said to be intended to prevent similar harms.

Hunt, supra at 317

concerning firearms designed to address statewide concerns about their acquisition, registration and use. The statutes were designed to "strengthen state enforcement provisions regarding firearms." 58b The stolen shotguns involved in the present case were, unlike the pawned watch in Hunt, property which the legislature has specifically addressed and set apart from the general type of property covered in the stolen property statute, MCL 750.535, because of the unique potential harm to society which firearms can cause and because of the growing concerns society has with their proliferation, particularly those that are stolen. Since the laws at issue here (general stolen property in Hunt and stolen firearms in the present case) were designed to prevent different social harms or evils (even if the decision in Squires was not persuasive), the protections of double jeopardy would not be violated by the prosecution of the defendant herein. Crampton v 54-A District Judge, supra.

G. Conclusion

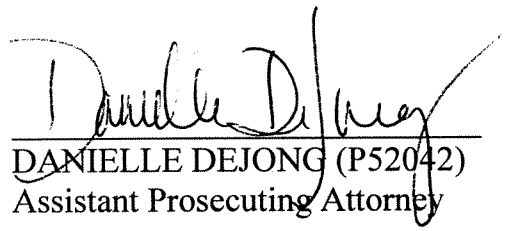
This Court should overrule White because White deviated from the plain language of the constitution as well as the intent of the ratifiers of the 1963 Constitution when the Court adopted the judge-made "same-transaction" double jeopardy test. The defendant's charge in this case should be reinstated because the prosecution violated neither Blockburger--which the People submit should govern successive prosecution double jeopardy claims--nor White.

RELIEF

WHEREFORE, David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court overrule the case of People v White and affirm the Court of Appeals' opinion reversing the lower court's order of dismissal of the charge in this case.

Respectfully submitted,

DAVID GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

BY: 
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